

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

FEB 20 1969

CHECKER VAN & STORAGE OF OAKLAND, INC.,)
)
Appellant,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee,)
)
_____)

No. 21961

APPELLANT'S
OPENING BRIEF

APPEAL FROM THE JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE ALBERT C. WOLLENBERG
UNITED STATES DISTRICT JUDGE

FILED

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OCT 10 1967



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I. STATEMENT OF PLEADINGS

The complaint, filed on 4 October 1966 (T1),¹ alleges that:

A. Appellant is a public warehouseman and entered into a contract with the United States for storage of goods of military personnel (T2). Copies of the contract and of the warehouse receipt issued for said goods are attached to the complaint as Exhibits A and B (T4-26).

B. About 2 March 1964 a fire occurred in the warehouse leased by appellant where the goods were stored; the goods were damaged and the contracting officer determined that appellant was liable in the sum in excess of \$10,000 for the damage to the goods. Appellant appealed to the Armed Services Board of Contract Appeals (T2).

C. The Armed Services Board of Contract Appeals issued two decisions affirming the action of the contracting officer. The decisions are attached to the complaint as Exhibits C and D (T27-40).

D. The United States has threatened to register appellant's name on the List of Contractors Indebted to the

¹The transcript on appeal will be referred to as T.



United States and has threatened to cancel all of appellant's contracts with the United States if payment is not made by appellant for the loss of said goods (T2-3).

E. The decision of the Armed Services Board of Contract Appeals is contrary to law and is not supported by substantial evidence (T3).

F. The action was brought pursuant to Federal Rules of Civil Procedure Rule 57; 28 USC §1331; 41 USC §321 and §322 and 5 USC §1009 (T1). The jurisdiction of the District Court also was claimed on the basis of 28 USC §1346(a)(2) (T46-47; 51).

The United States filed a motion to dismiss (T41-45); appellant filed a memorandum in opposition to the motion to dismiss (T46-52).

On 16 March 1967 the court filed its order granting the motion to dismiss (T54-55); judgment of dismissal was entered on 16 March 1967 (T57).

A notice of appeal was timely filed on 12 May 1967 (T58).

This court has jurisdiction to review the dismissal of this action pursuant to 28 USC §1291.

II. STATEMENT OF THE CASE

The sole question in this appeal is whether the United States District Court has jurisdiction over the complaint filed herein. Appellant contends that the basic jurisdiction of the



District Court rests upon 28 USC §1346(a)(2) and 41 USC §§321 and 322, and that therefore pursuant to Federal Rules of Civil Procedure Rule 57 and 28 USC §2201-2 and 5 USC §1009 the District Court has jurisdiction to entertain this declaratory relief action.

III. SPECIFICATION OF ERROR

The error claimed to have occurred in this case is the dismissal of the action by the District Court.

IV. ARGUMENT

A. Summary

The Court of Claims has no jurisdiction of the case since its jurisdiction is restricted by 28 USC §1491 to claims against the United States; appellant herein is resisting a claim of the United States. Congress has expressed its intent pursuant to 41 USC §§321 and 322 to allow judicial review from a determination of the Armed Services Board of Contract Appeals and the only review available is in the United States District Court. The District Court's jurisdiction pursuant to 28 USC §1346(a)(2) is not limited to claims, but extends to "actions" as well. In light of the above, the \$10,000 limitation of 28 USC §1346(a)(2) must be disregarded so as to provide appellant with the congressionally intended judicial review of the decision of the Armed Services Board of Contract Appeals.



B. There is no jurisdiction in the Court of Claims.

28 USC §1491 limits the jurisdiction of the Court of Claims to "claims" against the United States; as shown by the complaint (T1) appellant has no claim against the United States but is resisting a claim of the United States against appellant. Therefore, the Court of Claims has no jurisdiction over this case.

C. The United States District Court has jurisdiction.

28 USC §1346(a)(2) upon which appellant bases the jurisdiction of the District Court, refers to "civil action" or claims against the United States, clearly indicating that the jurisdiction of the District Court is not limited to a money claim against the United States.

Wells v United States (9th Cir 1960) 280 Fed2d 275 [cited by appellee below (T44)] is not to the contrary. Pursuant to statutory authority, the AEC sold land to a former lessee. A dispute arose concerning a deduction from the purchase price of the value of certain improvements made by the lessee. The dispute was referred to an AEC administrative hearing. A decision unfavorable to the lessee was rendered and he filed suit in the District Court for declaratory judgment. The case was dismissed and affirmed on appeal.

The case is distinguishable because the AEC statute



expressly precluded judicial review of the determination of the AEC hearing officer. To the contrary in the case at bar, 41 USC §321 and §322 expressly call for judicial review of the determination of the Armed Services Board of Contract Appeals.

In Blanc v United States (2nd Cir 1957) 244 Fed2d 708 (cited in Wells), a widow sued the United States for widow's benefits under the Federal Employees Compensation Act (5 USC §751). An administrative hearing was held and the ruling was unfavorable to the widow. She then filed a declaratory judgment suit in the United States District Court; the action was dismissed and affirmed on appeal.

The Court held that since the claim exceeded \$10,000, only the Court of Claims had jurisdiction. On this basis alone the case is distinguishable from the case at bar where the Court of Claims does not have jurisdiction because of the lack of a money claim by appellant.

The Court also noted that 5 USC §793 expressly prohibits judicial review of the administrative determination; the section states that the administrative determination shall be "final and conclusive for all purposes and with respect to all questions of law and fact and not subject to review by any court". To the contrary, in the case at bar, 41 USC §321 and §322 show that the determination of the Armed Services Board of Contract Appeals



is not to be final and conclusive but is to be judicially reviewable.

In Clay v United States (DC Cir 1953) 210 Fed2d 686 (cited in Wells) the plaintiff filed a declaratory relief action in the District Court against the United States to void an assignment of a patent. The action was dismissed and affirmed on appeal.

The court held that 28 USC §1346(a)(2) does not lie for an equity suit, but only for a money claim. The case is distinguishable, however, in that the court did not deal with the issue of whether the District Court had residual jurisdiction if the Court of Claims did not have jurisdiction. That is the issue before this Court in the case at bar.

Appellee below (T43) cited three cases for the proposition that the District Court lacked jurisdiction because appellant's controversy with United States exceeds \$10,000. The cited cases, Barnes v United States (9th Cir 1956) 241 Fed2d 252; United States v Tacoma Oriental SS Co (9th Cir) 86 Fed2d 63 and Ove Gustavsson Contracting Co v Floete (2nd Cir 1960) 278 Fed2d 912, cert den 264 US 894, all were cases involving a money claim in excess of \$10,000 by a plaintiff against the United States; in each case it was clear that the Court of Claims had jurisdiction and that there was no need for jurisdiction to be found in the District Court



The case at bar does not involve a money claim and therefore the case is not within the jurisdiction of the Court of Claims. In such a situation, the fact that the controversy is in excess of \$10,000 should not preclude appellant from any judicial relief but should place jurisdiction in the courts of residual jurisdiction, namely, the United States District Courts.

D. Congress intended for the United States District Courts to have jurisdiction to review decisions of the Armed Services Board of Contract Appeals.

Chapter 5 of 41 USC deals with "judicial review of administrative decisions" and §321 provides that:

"no provision of any contract entered into by the United States...shall be pleaded in any suit...as limiting judicial review: provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply a bad faith or is not supported by substantial evidence."

It is obvious that this section is intended to provide judicial review where a party (as appellant) claims that the decision of the administrative body is not supported by substantial evidence.

Furthermore, 41 USC §322 states: "no government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board".



This section shows the intent of Congress to provide judicial review of questions of law involved in a determination of an administrative body. The "dispute clause" of the contract involved in this case (T10) incorporates that law and provides that "nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law".

The significance of 41 USC §322 and the dispute clause is shown by a comparison to Wells and Blanc, supra. The statutes in both cases expressly preclude judicial review of the administrative decision.

However, it is clear from 41 USC §322 that Congress intended that judicial review be available from a decision of the Armed Services Board of Contract Appeals.

Since the judicial review from that determination is not available in the Court of Claims, it is obvious that the intent of Congress would be frustrated unless judicial review was available in the United States District Courts.

E. Conclusion.

Upon an analysis of 28 USC §1346(a)(2) and 41 USC §321 and §322, it is clear that Congress has expressed an intent that judicial review shall be available from a decision of the Armed Services Board of Contract Appeals.



Since the Court of Claims has jurisdiction solely over claims for money and since the District Court's jurisdiction is not limited to claims for money, it is clear from logic and from the above statutes that the District Court has jurisdiction over this case even though it involves in excess of \$10,000.

To hold otherwise is to deprive appellant of any judicial recourse even though the United States has threatened to place appellant's name on the List of Contractors Indebted to the United States and has threatened to cancel all of appellant's contracts with the United States if payment is not made by appellant for the loss of the goods. Under these circumstances, due process of law requires that appellant be given judicial review immediately by the United States District Court.

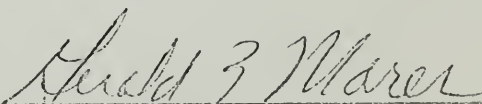
For the above reasons, the judgment of dismissal should be reversed.

DATED: San Francisco, California
16 October 1967

Respectfully submitted,

LONG & LEVIT
JOHN B. HOOK
GERALD Z. MARER

BY:



Gerald Z. Marer

Attorneys for appellant



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeal for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DATED: 16 October 1967
San Francisco, California



Gerald Z. Marer
Attorney for Appellant



I am a citizen of the United States and a resident of the county of SAN FRANCISCO I am
over the age of eighteen years and not a party to the within above entitled action; my residence address is: business

465 California Street, San Francisco, California

On 17 October, 1967, I served the within

APPELLANT'S OPENING BRIEF

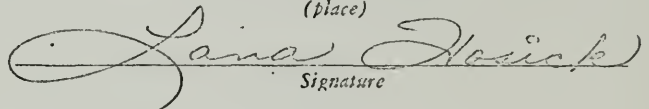
on the appellee in said action, by placing a true copy thereof enclosed in a sealed envelope

with postage thereon fully prepaid, in the United States post office mail box at _____
addressed as follows:

to: Messrs. Alan S. Rosenthal and Robert C. McDiarmid
Attorneys
Appellate Section
Civil Division, Room 3706
United States Department of Justice
Washington 25, D. C.

I certify (or declare), under penalty of perjury,* that the foregoing is true and correct.

Executed on 17 October 1967 at San Francisco, California
(date) (place)


Signature

*proof of service by mail forms, being signed under penalty of perjury, do not require notarization.

